SILVERSTONE BHD

v.

MENTERI SUMBER MANUSIA & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
RAUS SHARIF J
[APPLICATION COURT NO: R1-25-111-2000]
9 NOVEMBER 2004

LABOUR LAW: *Trade union - Recognition - Employer directed by Minister to recognize union - Whether Minister had erred in making such decision - Whether decision should be quashed by certiorari*

The second respondent had submitted a claim for recognition under s. 9 of the Industrial Relations Act 1967 ('the Act'). The claim was in respect of the applicant's employees engaged in the executive and supervisory categories. A membership check conducted by the DGTU revealed that 55.96% of the applicant's employees within the second respondent's scope of representation were members of the second respondent. The applicant was advised to accord recognition. The applicant declined to do so and requested the DGIR to review the matter. The applicant *inter alia* raised the objection that its employees in the supervisory category were in fact eligible to be members of the National Union of Employees in Companies Manufacturing Rubber Products ('the National Union'). The matter was referred to the Minister who eventually directed that recognition be accorded to the second respondent. Thus, the applicant applied for *certiorari* to quash the decision of the Minister. The applicant claimed *inter alia*: (i) that the Minister erred in failing to consider the DGIR's omission to undertake further investigation under s. 9(4B)(b) of the Act in light of the National Union which could also represent the applicant's employees in the supervisory category; and (ii) the Minister erred when he failed to appreciate that the recognition claim was defective. The claim was said to be defective since the employees in the executive category were apparently included for the purposes of determining the percentage of the employees' membership. The second respondent, claimed the applicant, was seeking recognition to represent employees engaged in the supervisory and executive categories at the same time under a common claim for recognition. This was in breach of s. 9(1) of the Act.

Held (dismissing the application with costs):

[1] On the facts, the issue of non-compliance with s. 9, in particular s. 9(4B)(b), did not arise as a membership check was carried out by the DGTU to determine the competency of the second respondent to represent the applicant's executives and supervisors. The applicant's contention that the second respondent should not be accorded recognition to represent its supervisors was also contradictory. Several years earlier, the applicant had questioned the National Union's competency to represent its supervisors and the Minister had by a decision dated 25 July 1996 declared that the applicant's supervisors were not within the National Union's scope of representation. The applicant had also not adduced any evidence to substantiate its claim that its supervisors were members of the National Union. (p 619 a-c)

[2] The second respondent did not contravene s. 9(1) of the Act. It was clear from the Minister's decision of 25 July 1996 that supervisors had been recognized as belonging to the managerial, executive, confidential or security capacity. The applicant's stand was also contradictory and not *bona fide*. The applicant, after having successfully blocked the National Union from representing its supervisors, was presently seeking to prevent the second respondent's representation of its supervisors by claiming that its supervisors should now be represented by the National Union and that the Minister had contravened s. 9(1) of the Act by recognizing the second respondent as a competent union to represent its supervisors and executives. (pp 619 c-f & 620 b-g)

Legislation referred to:
Industrial Relations Act 1967, s. 9(1), (4B)(b)

For the applicant - N Sivabalah (Raymond TC Low); M/s Shearn Delamore & Co
For the 1st respondent - Hasilah Awang SFC
For the 2nd respondent - S Muhendaran (Cik Mehala); M/s Muhendran Sri

Reported by Andrew Christopher Simon

JUDGMENT

Rauf Sharif J:

Application

This is an application by Silverstone Berhad (the applicant), a company engaged in the manufacture of tyre product for an order of *certiorari* to quash the decision of the Minister of Human Resources (the Minister) made under s. 9 of the Industrial Relations Act 1967 (the Act). The Minister made his decision on 20 September 2000 whereby he directed the applicant to accord recognition to Kesatuan Kakitangan Eksekutif dan Penyelia Silverstone Berhad (the second respondent) in respect of employees engaged in the executive and supervisor categories, except those holding the post of manager, assistant manager, confidential or security.

Facts

The facts leading to this application are these. On 25 January 1999, the second respondent submitted a claim for recognition under s. 9 of the Act in respect of employees of the applicant engaged in the executive and supervisory categories except for the post of manager, assistant manager confidential or security. The applicant, in accordance with the provision of Part III of the Act, requested for a membership check to determine the eligibility of the second respondent to represent the employees within the scope of the recognition sought. For the purposes of conducting the membership check, the applicant provided the Director General of Industrial Relations (DGIR) with a list of all the employees of the applicant engaged in the executive and supervisor categories as at 25 January 1999. From the list a total of 133 employees were employed as the executive and supervisor categories and of the 133 employees, 47 of them were employed in the executive category.

The Director General of Trade Union's (DGTU) officers conducted the membership check on 20 December 1999. By a letter dated 31 January 2000, from the Industrial Relation Department, the applicant was informed that pursuant to the membership check, 55.96% of the employees within the scope of representation of the second respondent were members of the second respondent as at 25 January 1999. The applicant was advised to accord recognition to the second respondent.

The applicant, by its letter dated 4 May 2000 to the DGIR declined to accord recognition to the second respondent and requested the DGIR to review the matter for the reason stated therein. One of the objection raised by the applicant at the material time was that the employees in the supervisor category were eligible to be members of the National Union of Employee in Companies Manufacturing Rubber Products (the National Union).

The matter was referred to the Minister. By a letter dated 30 September 2000 from the Industrial Relation Department, the applicant was informed that the Minister had directed under s. 9(5) of the Act, that recognition be accorded by the applicant on the second respondent.Hence, this application.

Grounds Of Application

The applicant forwarded three grounds to substantiate its application to quash the decision of the Minister. But at the hearing the applicant relied only on two grounds namely:

1. The Minister erred in law in failing to take into consideration the omission of the DGIR to undertakes further investigationunder s. 9(4B)(b) of the Act in light of the existence of the National Union which could also represent employees in the supervisory category.

2. The Minister erred in law hen he failed to appreciate that the recognition claim was defective in light of the inclusion of the employees in the executive category for the purposes of determining the percentage of the employees' membership in the Union and the inclusion of this executive category was in breach of s. 9(1) of the Act. The Minister had therefore acted *ultra vires* s. 9(1) of the Act.

First Ground

The Minister erred in law in failing to take into consideration the omission of the DGIR to undertakes further investigationunder s. 9 (4B)(b) of the Act in light of the existence of the National Union which could also represent employees in the supervisory category.

Briefly the applicant's contention is that the second respondent is not competent to represent the applicant's workmen belonging to the supervisor category. The applicant is of the view that the Supervisors are members of the National Union which was accorded recognition in 1992. Hence, the Minister should not have directed the applicant to accord recognition to the second respondent. A further contention by the applicant is that the DGIR failed to investigate the issue concerning the second respondent's competency and the Minister failed to consider the DGIR's inactions before directing the applicant to accord recognition.

The issue here is s. 9 of the Act. For ease of reference the relevant provisions of s. 9 are hereby produced:

Claim for recognition

9(1) No trade union of workmen the majority of whose membership consists of workmen who are not employed in any of the following capacities that is to say:

(a) managerial capacity;

(b) executive capacity;

(c) confidential capacity; or

(d) security capacity,

may seek recognition or serve an invitation under section 13 in respect of workmen employed in any of the abovementioned capacities.

(1A) Any dispute arising at any time, whether before or after recognition has been accorded, as to whether any workman or workmen are employed in a managerial, executive, confidential or security capacity may be referred to the Director General by a trade union of workmen or by an employer or by a trade union of employers.

(2) A trade union of workmen may serve on an employer or on a trade union of employers in writing in the prescribed form a claim for recognition in respect of the workmen or any class of workmen employed by such employer or by the members of such trade union of employers.

(3) An employer or a trade union of employers upon whom a claim for recognition has been served shall, within twenty-one days after the service of the claim:

(a) accord recognition; or

(b) if recognition is not accorded, notify the trade union of workmen concerned in writing the grounds of not according recognition; or

(c) apply to the Director General to ascertain whether the workmen in respect of whom recognition is being sought are members of the trade union of workmen concerned and give a written notice of such application to such trade union of workmen.

(4) Where the trade union of workmen concerned receives a notification under paragraph (3)(b), or where the employer or trade union of employers concerned fails to comply with subsection (3), the trade union of workmen may report the matter to the Director General.

(4A) The Director General, upon receipt of a reference under subsection (1A), or an application under paragraph (3)(c), or a report under subsection (4) may take such steps or make such enquiries as he may consider necessary or expedient to resolve the matter.

(4B) For the purpose of carrying out his functions under subsection (4A) the Director General:

(a) shall have the power to require the trade union of workmen, the employer, or the trade union of employers concerned to furnish such information as he may consider necessary or relevant; and

(b) may refer to the Director General of Trade Union for his decision any question on the competence of the trade union of workmen concerned to represent any workmen or class of workmen in respect of whom recognition is sought to be accorded, and the performance of duties and functions by the Director General of Trade Union under this paragraph shall be deemed to be a performance of his duties and functions under the written law relating to the registration of trade unions.

(4C) Where the matter is not resolved under subsection (4A) the Director General shall notify the Minister.

(5) Upon receipt of a notification under subsection (4C) the Minister shall give his decision thereon; where the Minister decides that recognition is to be accorded by the employer or trade union of employers concerned, as the case may be, as from such date as the Minister may specify; a decision of the Minister under this subsection may include a decision as to who are workmen employed in a managerial, executive, confidential or security capacity.

The question is, has s. 9 of the Act been complied with? My answer is yes. In this case the second respondent's claim for recognition was submitted on the application on 25 January 1999. The applicant refused to accord recognition. Hence the second respondent reported in writing to the DGIR. The DGIR then requested for the list of applicant's supervisors and executives and referred to DGTU for membership check to determine the competency of the second respondent to represent the supervisors and executives. As the result of the membership check, 55.96% of the applicant's supervisors and the executives were members of the second respondent and fall within the scope of the second respondent. Thus, the applicant was advised by the DGIR to accord recognition. But the applicant refused to accord recognition and the Minister was notified of the refusal. The Minister under the power vested in him under s. 9(5), after considering the matter before him directed the applicant to accord recognition on the second respondent beginning 25 January 1999.

From the above facts, the issue of non-compliance of s. 9 and in particular s. 9(4B)(b) does not arise as membership check exercise was carries out by the DGTU to determine the competency of the second respondent to represent the executive and the supervisors. It was contended by the applicant that the applicant's supervisors are members of the National Union and as such the second respondent should not be accorded recognition to represent the supervisors. There is no dispute that the National Union was accorded recognition by the applicant as of 1992 but the scope of representation of the National Union, as admitted by the applicant, is "in respect of all employees employed by the applicant, except for those in the managerial, executive, confidential or securities capacities". Clearly the applicant's executives are not within the second respondent scope of the representation. The question is do supervisors fall within the National Union's scope of representation?

This issue also formed a source of an earlier dispute between the applicant and the National Union. The applicant had questioned the National Union's competency to represent the supervisors and attempted to restrict the supervisors from the National Union's scope of representation. The matter was also referred to the Minister to be resolved. The Minister by his decision dated 25 July 1996, held that the supervisors belong to the category of managers, executives, confidential staff or security staff and thus, not within the National Union scope of representation. Clearly there is a contradiction in the applicant's stand on this matter.

In any event the applicant has not adduced any evidence to substantiate its claim that the supervisors are members of the National Union. In fact the supervisors cannot be members of the National Union as the National Union members are made up of non-supervisory members and is prohibited from seeking representation of employees in managerial, executive, confidential or security capacity.

Thus, I find no merit on the applicant's first ground.

Second Ground

The Honourable Minister erred in law when he failed to appreciate that the recognition claim was defective in light of the inclusion of the employees in the executive category for the purposes of determining the percentage of the employees' membership in the union and that the inclusion of this executive category was in breach of s. 9(1) of the Act. The Minister had therefore acted *ultra vires* s. 9(1) of the Act.

The applicant contended that the claim for recognition is fundamentally defective on the premise that the second respondent is seeking recognition to represent employees engaged in the supervisory and executive category at the same time under a common claim for recognition. This according to the applicant is a breach of s. 9(1) of the Act.

To me, contrary to the applicant's contention, the second respondent did not contravene s. 9(1) of the Act as it is clear from the Minister's decision on 25 July 1996 that supervisors have been recognised as belonging to the managerial, executive, confidential or security capacity. This has not been disputed by the applicant. To me, the applicant's stand on this issue is contradictory and not *bona fide* as:

(a) the applicant in recognising the National Union in 1992 sought to reverse the supervisors from the National Union's scope of representation when the matter was referred to the Minister the issue was decided in the applicant's favour wherein the supervisors were classified in the same category or Managers, Executive, Confidential Staff and Security Staff.

(b) At the present stage, the applicant seek to remove the supervisors from the second respondent's scope of representation by claiming that the supervisors should be represented by the National Union and alleged that the Minister has contravened s. 9(1) of the Act in recognising the second respondent as a competent union to represent both the supervisors and executives.

Thus, I also find no merit in the applicant's second ground.

Conclusion

In conclusion, it is worthwhile to note that a trade union must satisfy two requirements before it could be accorded with recognition. Firstly, it must satisfy the requirement that it is competent to represent the employees of a particular industry under its membership rules and there must be similarly in trade, industry and profession between the trade union and the company. Secondly, it must have sufficient members to represent the employees. On the facts of this case, the second respondent, has fulfilled both requirements. The applicant has failed to prove otherwise.

In the circumstances, the applicant's application is dismissed with costs.